Supreme Court, U. S.
FILED
MAY 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1122

STATE OF LOUISIANA,

Respondent,

versus

JAMES PARISI, ROBERT D. WERKAU, JR., KENNETH P. BAKUTIS, and FRANK BRITTON,

Petitioners-Relators.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF LOUISIANA, IN CASE NO. 58529, OF THE DOCKET OF THAT COURT

HARRY F. CONNICK,
DISTRICT ATTORNEY FOR THE
PARISH OF ORLEANS

JOSEPH MEYER, JR.,
ASSISTANT DISTRICT ATTORNEY
FOR THE PARISH OF ORLEANS

2700 Tulane Avenue
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

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By letter of date April 5, 1977, the Clerk of the Supreme Court of the United States requested the District Attorney of Orleans Parish, State of Louisiana, to respond to the Writ Application filed herein by the above-named defendants. The following is in compliance with that request.

QUESTION PRESENTED FOR REVIEW

The State of Louisiana perceives the question for review to be much narrower than that assigned by the Relators. The sole question of any substance appears

to be that of the arrest of the relators and whether said arrest was violative of constitutional safeguards guaranteed to them by the Fourth, Fifth and Fourteenth Amendments of the United States Constitution.

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT

1. United States Constitution, Fourth Amendment
2. United States Constitution, Fifth Amendment
3. United States Constitution, Fourteenth Amendment
4. La. Code of Criminal Procedure, Article 213
5. La. Revised Statutes 14:108, Resisting Arrest
6. La. Revised Statute 14:34, Aggravated Battery

STATEMENT OF THE CASE

A review of the trial transcript reveals that on February 24, 1976 at about 1:30 a.m. members of the New Orleans Police Department responded to a radio dispatch to the effect that a shooting had occurred. Upon arrival at the scene, a trailer park, the police were met by a Thomas Witkowski. Mr. Witkowski related to the police that he was a visitor from Wisconsin staying at the trailer park and that he had just been shot by another trailer park resident who he did not know, but who he believed was from Illinois. Mr. Witkowski was bleeding visibly from his shoulder.

The officers began a canvass of the trailer park checking for Illinois license plates. As they began their canvass they were approached by an unnamed trailer park resident who indicated to them that he saw

the persons who had shot Mr. Witkowski go in a certain trailer and pointed the trailer out to the police officers. The officers approached the trailer and knocked on its outside walls; one of the occupants came to the door, saw that it was police (the police were in uniform) and immediately slammed the door, shouting meanwhile to his co-occupants, "It's the police."

A great amount of internal noises and shuffling was heard by the police and they forced their way into the trailer where five persons were arrested. Narcotics and an arsenal of weapons were seized. The defendants were charged with a variety of offenses, including aggravated battery, possession of barbiturates, possession of marijuana, and resisting arrest. The resisting arrest occurred after the defendants had been placed in custody once the police had entered the trailer. (See Arrest Register Appendix A).

Only two charges were accepted by the District Attorney's Office: possession of barbiturates and resisting arrest. The more serious charge of aggravated battery was not accepted due to the transient character of the victim, a Wisconsin resident.

On June 7, 1976, the defendants were found not guilty of the possession of barbiturates upon the production of prescriptions at the trial. On the trial of resisting arrest the State amended its Bill of Particulars to conform with evidence presented through testimony. The defense moved for a mistrial and it was granted. The defense waived its right of notice of trial and elected to commence a new trial immediately. (See Appendix B). The trial was held and the relators were found guilty as charged as to resisting arrest.

An appeal was had to the Appellate Division of the Criminal District Court and four District Court judges unanimously concurred in the judgment of the trial judge on July 12, 1976.

A writ of certiorari was submitted to the Supreme Court of Louisiana asking that they review the matter, and on November 19, 1976, they refused certiorari without dissent. A Writ Application has now been lodged in this Honorable Court.

ARGUMENT

It is the State's position that the myriad issues raised by the relators, situated as they are within the narrow limits of Louisiana procedure, do not rise to the level of constitutional questions. Specifically, the State would point to the following issues:

1. Disparity Of Sentences

Of the five persons arrested and eventually sentenced three had identical sentences and two were sentenced at variance with each other and the other three. The relators' allegations as to what is "customarily" given as a sentence in these matters are hollowly averred and lack substantiation. Equal protection and due process have never required identical sentences for the same offense.

2. The Amended Bill Of Particulars

The Bill of Particulars serve to place the defendant on notice more fully than the Bill of Information, or indictment. It does not, however, charge the crimes with

which the defendant is accused. When the State amended the Bill of Particulars the court granted the defense a mistrial. They then proceeded with the new trial. Two levels of appellate review found no fault with these proceedings as a matter of Louisiana law and the State fails to appreciate any constitutional implications.

3. The Informer

The State is amazed at the relators' use of the word "informer". It is such a stark misnomer as to defy common sense. The "informers" as defined by applicant are "the man allegedly shot and the man who pointed out the mobile home". A proper nomination of these persons are victim/witness and witness. The issue of an informer simply does not exist.

The only issue of any substance, State perceived, is that of the legitimacy of the arrest. Arrest without a warrant is not happily received by the courts. The ancient traditions of our legal system do not encourage warrantless arrests. Yet, legal revulsion has given way over the years to the exigent circumstance: A practical recognition that a law enforcement officer may find himself in a situation where to obtain a warrant is to lose the offender, or where common sense dictates immediate action.

The validity of an arrest without warrant must depend upon compliance with legal standards determined by each state. *United States v. DiRe*, 332 U.S. 581, 68 S.Ct. 222 (1948). Louisiana has established those legal standards in Article 213 of the Louisiana Code of Criminal Procedure:

Art. 213. Arrest by officer without warrant; when lawful

A peace officer may, without a warrant, arrest a person when:

(1) The person to be arrested has committed an offense in his presence, and if the arrest is for a misdemeanor it must be made immediately or on close pursuit;

(2) The person to be arrested has committed a felony, although not in the presence of the officer;

(3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense although not in the presence of the officer; or

(4) The peace officer has received positive and reliable information that another peace officer holds a warrant for the arrest.

Existence of the grounds for the arrest, if made on reasonable cause is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case. What is reasonable is to be determined by the facts of the particular case and the practical considerations of everyday life on which reasonable and prudent men act. *Ker v. State of California*, 374 U.S. 23, 83 S.Ct. 1623 (1963); *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949).

Assuming that the Louisiana statutory legal standards for a warrantless arrest do not encumber, or violate, constitutionally guaranteed rights, then it is meet to measure the police officers' conduct by said standards.

The police arrive on the scene and encounter a man who is bleeding and he informs them that the man has been shot by someone from Illinois; another man points to a trailer indicating that the alleged offender entered that trailer; an inquiry at the trailer leads to a slammed door and much shuffling within the trailer.

At this juncture it is hard to question police cautionary action. One man has already been shot. Are they to discover if this is, in fact, the warren of the offender by waiting for a precipitate gun battle? Or does common sense suggest that they secure the trailer for the protection of their lives and possibly of other trailer park residents?

The shooting of another human being is a serious offense and not to be taken lightly. The relators make much of the "abandon" rampant during the New Orleans Mardi Gras. However, the laws of Louisiana are not suspended during Mardi Gras and the shooting of a person by another is still aggravated battery under Louisiana law, and it is the duty of the law enforcement officer to contain this activity, not to give it license. It is because of the transient population, and its potential for volatile action, that the police were required to take immediate action.

The State is at a loss to comprehend a rational alternative. The relators seem to suggest a warrant should have been obtained. Against whom should this warrant have been sworn? And at what location? Was it not more rational for the officers to have conducted an on scene investigation, as they did? The State submits that the exigent circumstances compelled the arrest without warrant to insure community safety.

Lastly, the relators raise for the first time the constitutionality of Louisiana Revised Statute 14:108. The State sees no merit in this proposition.

For the foregoing reasons, the State submits that there exists no constitutional infringement of the rights of relators and therefore the Writ Application should be denied.

Respectfully submitted,

HARRY F. CONNICK,
District Attorney
Parish of Orleans
State of Louisiana

JOSEPH MEYER, JR.,
Assistant District Attorney
Parish of Orleans
State of Louisiana

2700 Tulane Avenue
New Orleans, Louisiana 70119
Telephone: (504) 822-2414

CERTIFICATE OF SERVICE

I certify that a copy of the State of Louisiana's Brief has been served upon Relators by placing a copy of same in the United States mail, postage prepaid, addressed to:

Gerard H. Schreiber, Esq.
8137 Oleander Street
New Orleans, Louisiana 70118

Attorney for Petitioners-Relators

New Orleans, Louisiana, this
____ day of May, 1977.

APPENDIX A

CLERK'S OFFICE 4/25 19

A TRUE COPY

CRIMINAL DIST. COURT
PARISH OF ORLEANS

DEPARTMENT OF POLICE NEW ORLEANS, LA

ARREST REGISTER - MAGISTRATE OR MUNICIPAL COURT COPY

ARRESTEE DATA

WERKAU	ROBERT	P JR	M	N	112444	601	191	BRO	BLU	BUB
7004	LOCKWOOD	ST	BURBANK			IL		IL	US	189-102
MECHANIC										
					SINGLE	330303670		M629744463334		IL
NO									X	

ARREST DATA

7325	CHEFMENTEU HW	7C	022476	0230 AM	022476	0413 AM		
DAVID	MARCEL			961	764	07		
SAME	SAME							

CHARGES AND COURT SCHEDULE

RS 14-34 RS 40-966C1UP RS 14-108		AGGRAVATED BATTERY BY SHOOTING POSS.M.J.T.D. BARBITUATES POSS.OF CDC SCHD I 40 GRS MARIJUANA RESISTING ARREST

CDC/CDC	M/	022774/	0000 PM/
/ 1000.00			

OFFENSE DATA

7325	CHEFMENTEU HW	022476	0230 AM	TUESDAY	GUN .45 AUT	
WITKOWSKI	THOMAS		M	M	092854	
125	UNION ST	HEEMAN		MI	7220344	

REMARKS: ABOVE COMPLAINANT SHOT WIT .45 CAL.AUTO.PISTOL THROUGH INVESTIGATION OFFICERS IDENTIFIED ARRESTED SUBJECT AS WANTED SUBJECTS AND LOCATED SUBJECTS POSS.OF CDC SCHD I QTY OF BARBITUATES ALSO MARIJUANA.IN POSSESSION ALSO NUMEROUS WEAPONS (GUN...

53417

PARISHI 0401 AM — KENGSBURY,J.

APPENDIX A

BEST COPY AVAILABLE

CLERK'S OFFICE 4/2[illegible]/77

A TRUE COPY

[illegible] DEPUTY CLERK

CRIMINAL DIST. COURT

PARISH OF ORLEANS

DEPARTMENT OF POLICE NEW ORLEANS, LA.

ARREST REGISTER - MAGISTRATE OR MUNICIPAL COURT COPY

ARRESTEE DATA

PARISI JAMES N M W 060749 509 160 BLK BRO BLU 00401506

NONE IL US 179-104

MANAGER SAM'S FOOD AND LIQUOR STORE 00375616

MARRIED 329385320 P620453247224 IL 0

NO

ARREST DATA

7325 CHEFMENTUR 7C 022476 0230 AM 022476 0421 AM B21a1776

KAISER V 704 07

KAISER V 704

CHARGES AND COURT SCHEDULE

RS 14-34
RS 40-966D1B
RS 40-966C10P
RS 14-100

AGG. BATTERY 607004A
POSS. OF BARBITUATES WITH INT. TO DIST.
POSS. OF MARI.
RESISTING ARREST

CDC/CDC N/N 022776/ 0400 PM/

/ 1000.00

OFFENSE DATA

7325 CHEFMENTUR 022476 0230 AM TUESDAY

WITKOWSKI THOMAS

7325 CHEFMENTUR NOLA

ABOVE COMPLAINTANT SHOT WITH A 45 CAL. AUTOMATIC PISTOL THROUGH INV. OFFICERS IDENTIFIED ARRESTED SUBJECTS AS WANTED SUBJECTS. WHEN LOCATED SUBJECTS HAD LARGE AMOUNT OF BARBITUATES ALSO MARI. IN POSS. ALSO NUMEROUS WEAPONS (GUNS) RECIEVED A ARREST

53412

A.MILLER 0400 AM

M.EVANS

APPENDIX B

4/05/77

J. Wilson

DEPARTMENT OF POLICE NEW ORLEANS, LA.

ARREST REGISTER - MAGISTRATE OR MUNICIPAL COURT COPY

ARRESTEE DATA

[illegible] B 2454 510 139 BRO BLU FAIR [illegible] 179-104

705 N WALNUT ST GTTAnon GM GM US

MASTRESS 00375617

SINGLE 286566045

SCAR,RT.LITTLE FINGER ALSO SMALL SCAR RT.SIDE OF NECK BELOW EAR

HS

ARREST DATA

7325 CHEFMENTEU HM 7C 02247c 0230 AM 022476 0419 AM B21a177a

SCHMIDT K 1031 704 07

SAME SAME

CHARGES AND COURT SCHEDULE

RS 14-34
RS.40-966C10P
RS 14-100

AGG. BATTERY
POSS. [illegible]
RESISTING [illegible]

CDC N 022776 0400 PM

OFFENSE DATA

7325 CHEFMENTEU HM 02247a 0230 AM TUESDAY

WITKOWSKI THOMAS W M 092a54

123 UNION ST NEMAn WI 7229346

ABOVE COMPLAINT SHOT WITH 45 CAL.AUTO PISTOL.THOUG INVESTIGATION OFFICERS IDENTIFIED ARRESTED SUB. AS WANTED SUB. WHEN LOCATED SUB. HAD LARGE AMOUNT OF BARBITUATES AND ALSO MARIJUANA IN POSS..ALSO NUMEROUS WEAPONS)

53413

53444

J. [illegible]

JOSEPH.M. 0354 AM

FOURNOUX.L.

APPENDIX A

4/25 ...

DEPARTMENT OF POLICE NEW ORLEANS, LA.

ARREST REGISTER - MAGISTRATE OR MUNICIPAL COURT COPY

ARRESTEE DATA

BAQUTLE KENNETH P M M 090649 600 175 BRO BLU RUD 0434e1300

6435 S 84TH CT HICKORYHIL IL IL US 189-107

MACHINIST INT. ASS. OF MACHINIST 0037Se19

KEN MARRIED 256487213

TATLFARM PICTURE DESIGN 'ROSE', TATFARM PIC DES 'SKELETON ON MOTORCYCLE'

"I'M UNDER DOCTOR'S CARE"

ARREST DATA

7325 CHEPHENTEU NW 7C 022476 0230 AM 022476 0420 AM 021e177e

CHAMBERLAIN ALBERT 3 1201 702 07

CHAMBERLAIN ALBERT 3 1201 702

CHARGES AND COURT SCHEDULE

RS 14-34 AGGRAVATED BATTERY

RS 40-966D1D POSS. OF CDS SCH. III, II WIT DISTRIBUTE (MITD)

RS 40-966C10P POSSESSION OF MARIJUANA

RS 14-100 RESISTING ARREST

CDC/CDC H/R 0227764 0000 PM/

/ 1000.00

OFFENSE DATA

7325 CHEPHENTEU NW 022476 0230 AM TUESDAY GUN .45 AUTO

WITKOWSKI THOMAS M M 092e34

125 UNION ST HEEMAN MI 7226844

ABOVE COMPLAINANT SHOT WITH .45 CAL. AUTOMATIC PISTOL. THRU INVESTIGATION, OFFICER IDENTIFIED SUBJECTS AS WANTED SUBJECTS. WHEN LOCATED, SUBJECTS HAD LARGE AMOUNT OF BARBITUATES AND MARIJUANA AND NUMEROUS WEAPONS (GUNS). RESISTED ARREST

53414

A. MILLER 0401 AM W. JOHNSTON

Appendix A

CLERKS OFFICE 4/25 1972

TRUE COPY

DEPARTMENT OF POLICE NEW ORLEANS, LA.

ARREST REGISTER - MAGISTRATE OR MUNICIPAL COURT COPY

ARRESTEE DATA

BRITTON FRANK L M M 072240 511 133 BRO BRO HEA 0434e1302

7904 S MAIN ST HOMETOWN IL IL US 189-107

0037Se13

SINGLE 253490607

TATFARM; PIC/SNAKE,HORSE; DEATH BEFORE DISHONOR,TATLARM;PIC/NUDE WOMAN/ROSE

"I GOT A BUSTED LIP"; APPEARS MINOR

ARREST DATA

7325 CHEF NW 7C 022476 0230 AM 022476 0415 AM 021e1776

DAVID MARCEL L 704 07

KAISER 704

CHARGES AND COURT SCHEDULE

RS 14-34 AGGRAVATED BATTERY / VICTIM IN SERIOUS CONDITION-

RS 40-966D1D POSS. NARCOTICS WITH INTENT TO DISTRIBUTE

RS 40-966C10P POSSESSION OF MARIJUANA

RE 14-100 RESISTING ARREST

CDC/CDC H/ 0227764 0000 PM/

/ 1000.00

OFFENSE DATA

7325 CHEF NW 022476 0230 AM TUESDAY GUN .45 AUTO

WITKOWSKI THOMAS M M 092834

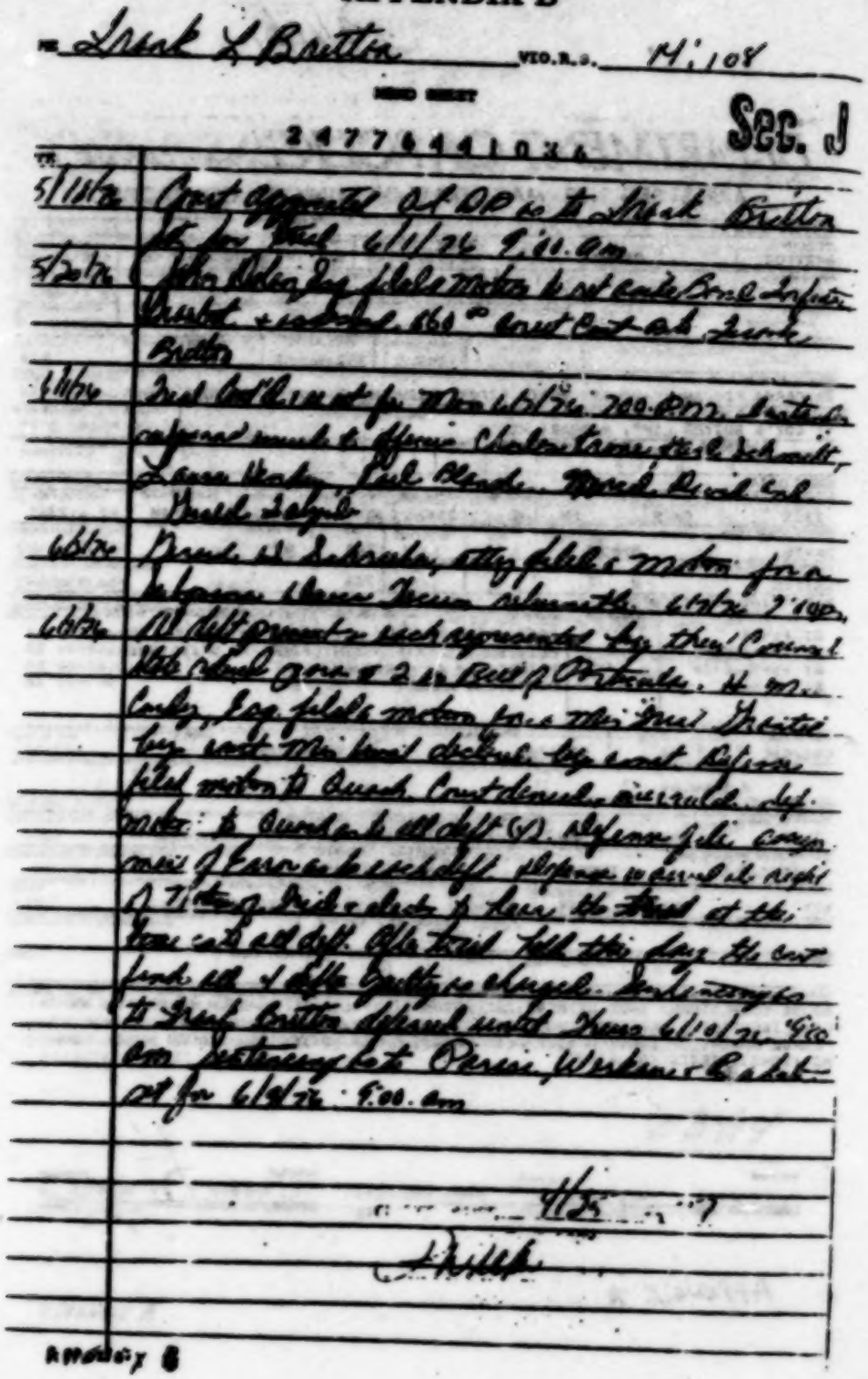
125 UNION ST HEEMAN MI 7226344

ABOVE COMPLAINANT SHOT WITH 45 CAL.AUTOMATIC PISTOL. THROUGH INVESTIGATION OFFICERS IDENTIFIED ARRESTED SUBJECTS AS WANTED SUBJECTS. WHEN LOCATED SUBJECTS HAD LARGE AMOUNT OF BARBITURATES ALSO MARIJUANA IN POSSESSION. ALSO NUMEROUS WEAPONS (GUNS). RESISTED ARREST

W. PHILLIPS 0401 AM L. LEDUCE

Appendix A

APPENDIX B



Frank L Britton VIO. R. O. 14,108

SEC. SHEET Sec. J

2 4 7 7 6 4 4 1 0 X 6

5/18/76 Court appointed Atty for Def to Frank Britton for Jury Trial 6/1/76 9:00 am

5/26/76 Atty Aldridge files Motion to set aside Bond Forfeiture Docket + subpoena 6th Court Cert ab Frank Britton

6/1/76 Trial Call set for Mon 6/7/76 10:00 AM. Instructed subpoena issued & Officers Chalestrom, Hall, Schmidt, Lance Hooker, Paul Reeder, Mark Reid and Harold Schyle

6/2/76 Prosecutor Schroeder, Atty files Motion for Subpoena Duces Tecum Schmidt 6/2/76 2:10 pm

6/6/76 All Def Counsel appointed by this Court Hab Corpus ad 2:10 Rec'd Portable. H. M. Cooley, Esq files Motion for a Mistrial Trial Court Denied Motion Def. Counsel: to Dismiss all Def (D) Defense Jeli Comm of Force when each Def Defense to Exercise right of Voir Dire check to Leave the Panel of the Jury in all Def. After Trial Tell this Day the Court finds all 4 Defs Guilty as Charged. Sentencing to Ft Leav Custody Defend until June 6/10/76 9:00 am pertaining Ct Person, Workmen Cabot Off for 6/8/76 9:00 am

H.S.

Phillips

APPENDIX C

§ 108. *Resisting an officer*

Resisting an officer is the intentional opposition or resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of property, or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property, or serving process is acting in his official capacity.

The phrase "obstruction of" as used herein shall, in addition to its common meaning, signification and connotation mean:

(a) Flight by one sought to be arrested before the arresting officer can restrain him and after notice is given that he is under arrest.

(b) Any violence toward or any resistance or opposition to the arresting officer after the arrested party is actually placed under arrest and before he is incarcerated in jail.

(c) Refusal by the arrested party to give his name and make his identity known to the arresting officer.

(d) Congregates with others on a public street and refuses to move on when ordered by the officer.

Whoever commits the crime of resisting an officer shall be fined not more than five hundred dollars or be imprisoned for not more than six months, or both.

APPENDIX D

§ 34. *Aggravated battery*

Aggravated battery is a battery committed with a dangerous weapon.

Whoever commits an aggravated battery shall be imprisoned, with or without hard labor, for not more than ten years.